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No. 86-1803

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM PETER BLATTY,
Petitioner,

vs.

NEW YORK TIMES COMPANY
and Does 1 through 10, inclusive,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GIBSON, DUNN & CRUTCHER
RICHARD P. LEVY*
GAIL E. LEES
WILLIAM C. FOUTZ
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000

THE NEW YORK TIMES COMPANY
DAVID A. THURM
229 West 43rd Street
New York, New York 10036
(212) 556-1714
Of Counsel

Attorneys for Respondent
THE NEW YORK TIMES COMPANY

Counsel of Record

Lawyers Brief Service / Legal Publishers / (213) 383-4457 / (714) 720-1510

QUESTION PRESENTED

I. Did the California Supreme Court indicate clearly and expressly that its decision rested on bona fide separate, adequate and independent grounds when:

a. the majority based its opinion on both the first amendment and the California Constitution's free speech clause and stated that "[i]t is the latter on which we primarily rely";

b. California Supreme Court and appellate opinions, including the opinion below, establish without dissent that the California Constitution's free speech clause is more definitive and inclusive than the first amendment;

c. the majority cited ten different California decisions as authority for its constitutional holding; and

d. the remaining three justices, who concurred in the dismissal of plaintiff's claim, concluded that plaintiff had not satisfied the state's tort pleading requirements?

RULE 28.1 LIST

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No. 86-1803

IN THE

Supreme Court of the United States

October Term 1986

WILLIAM PETER BLATTY,
Petitioner,

vs.

NEW YORK TIMES COMPANY
and Does 1 through 10, inclusive,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent The New York Times Company ("The Times") respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the California Supreme Court's opinion in this case. That opinion is reported at 42 Cal. 3d 1033, 728 P.2d 1177, 232 Cal. Rptr. 542 (1986).

JURISDICTION

This Court lacks jurisdiction to review this case. Petitioner's claimed jurisdictional basis, 28 United States Code Section 1257(3), does not provide jurisdiction because the decisions of *all seven members* of the California Supreme Court adverse to petitioner below "clearly and

expressly" showed that the dismissal of plaintiffs' claims was "based on bona fide separate, adequate and independent [state] grounds." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

CONSTITUTIONAL PROVISIONS INVOLVED

The first amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press.

Article I, section 2 of the California Constitution provides in pertinent part:

> (a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

STATEMENT OF THE CASE

This case presents the unusual question whether author William Peter Blatty may sue The Times under the California law of intentional interference with prospective business advantage[1] for failing to include his book, *Legion*,

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[1] Plaintiff also alleged causes of action for unfair competition (First Amended Complaint ("complaint") ¶¶ 23-27; App. 15-18); false and misleading advertising in violation of California Business and Professions Code §§ 17500-17572 (Complaint ¶¶ 28-33; App. 18-21); breach of the public duty and trust to report the news fairly and honestly without bias or prejudice (Complaint ¶¶ 34-39; App. 21-23); negligent interference with prospective advantage (Original Complaint ¶¶ 1-9; C.T. 1-4); negligence (Original Complaint ¶¶ 16-18; C.T. 5); and trade libel (Original Complaint ¶¶ 19-24; C.T. 6-7). The Times' demurrer, described in the text, *infra*, extended to these other claims as well. (C.T. 565-637).

on its weekly list of "best sellers" in the way Mr. Blatty wanted. Mr. Blatty filed his action because the book did not appear on the list as early as he thought it should, for as long as he thought it should, or in as high a position as he thought it should. All seven members of the California Supreme Court held that he could not maintain the lawsuit.

Three members of the court concluded that Mr. Blatty's complaint did not satisfy pleading requirements for the tort because his "allegations do not suggest that The Times intentionally misrepresented the actual results of its book store survey for the purpose of injuring Plaintiff financially." (App. 108-09) (Grodin, J., Broussard, J. and Lucas, J., concurring and dissenting). The majority of four held that Mr. Blatty could not sue The Times because the complaint centered upon an allegation of injurious falsehood, and the first amendment to the United States Constitution and the more speech-protective free speech provision in article I, section 2 of the California Constitution prevented the imposition of liability where a defendant had not made a statement "of and concerning" the plaintiff.[2] *The court stated explicitly that it was "primarily rely[ing]" on the California Constitution.* (App.

The trial court sustained the Times' demurrer as to all causes of action without leave to amend (C.T. 517-521, 689), and the California Court of Appeal and the California Supreme Court both unanimously affirmed the dismissal of all of these purported tort claims. They are not the subject of Mr. Blatty's petition. (App. 38-52).

[2] The Times submits that that conclusion is correct and is compelled by both federal and state constitutional precedent. The Times does not argue the merits of the majority's constitutional holding here, however, because the existence of a separate state ground for the decision precludes this Court's review. The Times addressed the merits of the holding in its Respondent's Brief in the California Court of Appeal and its Petition for Hearing in the California Supreme Court.

103 n.4) (Mosk, J., with Bird, J., Reynoso, J. and Panelli, J. concurring).

Mr. Blatty based his complaint principally upon claimed misrepresentations. He alleged that the legend that accompanies The Times' weekly list "expressly and impliedly . . . represented that the list was an objective, unbiased and accurate compilation of actual sales of books each week by 2000 book stores in every region of the United States." (Complaint ¶ 8; App. 6). The California Supreme Court and the trial court, however, took judicial notice of the legend, which actually stated: "The listings above are based on computer-processed sales figures from about 2,000 book stores in every region of the United States." (App. 66-67) (quoting legend).

Mr. Blatty further alleged that The Times knew the list was not an objective, unbiased or accurate reporting of actual sales because: (1) it used an undisclosed method of "weighting" book store sales; (2) it used prepared forms which contained a printed list of thirty-six "best selling" books when obtaining sales figures from book stores; (3) it mailed out four weeks of forms at a time so that the printed list on the forms was changed only monthly instead of weekly; (4) along with the forms, it mailed printed matter promoting certain books listed on the forms; and (5) it made no effort to investigate, check or review the sales figures that the book stores supplied. (Complaint ¶ 10; App. 7-9).

The intentional interference claim also was founded on an allegation that Legion "warrant[ed] inclusion on the List for many weeks during the summer of 1983" (Complaint ¶ 11; App. 9), and that plaintiff's publisher "contacted management employees of Defendants and provided information that Legion 'had sold more than sufficient copies to warrant inclusion on the List.' " (Complaint ¶ 13; App. 10). Mr. Blatty further alleged that The Times "intentionally or recklessly and without cause" excluded

"Legion" from the List except for one week in September, 1983, when it appeared in last place. (Complaint ¶ 15; App. 11-12).[3]

Mr. Blatty did not make the *one* allegation, however, that was crucial to a claim for interference with prospective business advantage under California law: that The Times' computer processed—sales figures, produced according to The Times' weighting system, listed his book among the top sellers but that The Times deliberately kept his book off the list for the purpose of injuring him. Indeed, Mr. Blatty did not allege at all that The Times altered its computer-processed list to remove his book. (App. 1-24). Nor did Mr. Blatty contend that The Times failed to survey 2,000 bookstores, or that the list was not computer based. (App. 1-24).

The Times demurred to the complaint. The Superior Court sustained the demurrer and entered a judgment of dismissal. (C.T. 690).

Plaintiff appealed. (C.T. 691). The California Court of Appeal, Second Appellate District, reinstated causes of

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[3] The complaint purported to set forth separate claims based upon: (1) The Times' weekly publication of its list in the Sunday Times (Complaint ¶¶ 5, 17-19; App. 4, 12-13); and (2) The Times' weekly publication of the List to book stores and other vendors (Complaint ¶ 21; App. 14), on the asserted ground that the latter was commercial speech less deserving of constitutional protection. The California Supreme Court rejected that attempted dichotomy. (App. 100-101 n.3).

The Court noted that the list was not commercial speech, as it was not "speech that does 'no more than propose a commercial transaction.' " (App. 100-101 n.3) (quoting *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 385 (1973)). It further stated that The Times' commercial motivation in disseminating the list "does not transform noncommercial speech into commercial speech." (App. 100-101 n.3). The concurring and dissenting opinion did not take issue with these holdings.

action for intentional interference with prospective business advantage. The court held that because plaintiff had alleged that his book was intentionally omitted from The Times' list, he had stated a cause of action for that tort. The Court of Appeal failed altogether to apply to the interference claims constitutional free speech protections under the California Constitution and the United States Constitution, which its own opinion acknowledged barred all other claims. (App. 38-39).

Both The Times and Mr. Blatty petitioned the California Supreme Court for a hearing, with The Times challenging the Court of Appeal's reinstatement of the intentional interference claims and Mr. Blatty challenging the Court of Appeal's affirmance of the dismissal of his other tort claims. *See* n.2, *supra.*

In two separate opinions, all seven members of the California Supreme Court agreed that Mr. Blatty could not sue The Times for failing to include Legion in its "best sellers" list. Justices Grodin, Broussard and Lucas found plaintiff's complaint deficient as a matter of state tort law because it did not satisfy the elements of a cause of action for intentional interference with prospective business advantage. (App. 108). These three justices concluded:

> Plaintiff's allegations do not suggest that the Times intentionally misrepresented the actual results of its book store survey for the purpose of injuring plaintiff financially; at most, the allegations suggest the Times did not do as thorough a job in gathering sales statistics as it should have and that, after Blatty's publisher complained to the Times, the Times should have realized that it's survey figures would harm Plaintiff financially.

(App. 108-109) (Grodin, J., Broussard, J. and Lucas, J., concurring in the result but dissenting from a portion of the majority's constitutional holding).

The majority of the Court, in an opinion by Justice Mosk, did not address these deficiencies of Mr. Blatty's complaint. The majority concluded, instead, that the complaint was constitutionally deficient under article I, section 2 of the California Constitution because Mr. Blatty could not allege an essential element of a claim for an alleged injurious falsehood under the California Constitution: that the falsehood occurred in a statement "of and concerning" him. (App. 93) (citing *Kelly v. Johnson Publishing Co.*, 160 Cal. App. 2d 718, 721-26, 325 P. 2d. 659 (1958); *Saucer v. Giroux*, 54 Cal. App. 732, 733-34, 202 P. 887 (1921)).

The majority opinion rested both on federal first amendment and on state free speech grounds. The majority "clearly and expressly" stated a "bona fide separate, adequate and independent" state constitutional ground, on which it "primarily rel[ied]" for its decision (App. 103 n.4), entirely apart from any first amendment considerations.

At the outset of its analysis, the majority acknowledged its agreement with the The Times' arguments that the first amendment and article I, section 2 of the California Constitution establish an absolute bar to liability. The majority referred to the first amendment's "zone of protection within which the press may publish without fear of incurring liability on the basis of injurious falsehood." (App. 78) (citing *Reader's Digest Assoc. v. Superior Court*, 37 Cal. 3d 244, 265, 690 P. 2d 610, 208 Cal. Rptr. 137 (1984); and four decisions of this Court).[4]

The majority then immediately cited the broader protections of the California Constitution, stating:

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[4] Those decisions are: *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 513, *reh. den.*, 467 U.S. 1267 (1984); *New York Times Co. v. Sullivan*, 376 U.S. 254, 267-83 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155, 162-165, 170, 172 (1967); and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-48 (1974).

> Article I, section 2, of the California Constitution, our state constitutional guarantee of freedom of expression and of the press, independently establishes a zone of protection that is broader still. (*See People v. Glaze*, (1980) 27 Cal. 3d 841, 844, n.2; *Robins v. Pruneyard Shopping*, (1979) 23 Cal. 3d 899, 908-910, aff'd. (1980) 447 U.S. 74; *Wilson v. Superior Court* (1975) 13 Cal. 3d 652, 658.)

(App. 78-79).

The majority opinion noted that it used the term "First Amendment" to "refer not only to that provision of the United States Constitution, but also to Article I, section 2, of the California Constitution." (App. 103 n.4). The court then stated: "It is the latter on which we primarily rely." (*Id.*).

Because of that state constitutional and case law reliance, the majority opinion was strewn with references to decisions of the California Supreme Court. The Court quoted from or cited ten separate California decisions in its analysis of the constitutional free speech issue, alone.

After citing the references quoted above, the Court again quoted its decision in *Reader's Digest Assoc. v. Superior Court*, 37 Cal. 3d at 265, this time for the propositions that "constitutional protection does not depend on the label given the stated cause of action" (App. 83), and that a public figure plaintiff must prove actual malice in an action for intentional infliction of emotional distress,[5] "false light"

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[5] To this extent, *Reader's Digest Association* is at odds with the decision of the Fourth Circuit Court of Appeals in *Falwell v. Flynt*, 797 F.2d 1270 (4th Cir.), *reh. den.*, 805 F.2d 484 (4th Cir.), *cert. granted*, 107 S. Ct. 1601 (1987) (presenting the question whether "First Amendment defenses applicable to libel [are] also applicable to claims of intentional infliction of emotional distress when such claims are based

invasion of privacy and "intrusion" invasion of privacy (App. 84). The majority also cited *Kapellas v. Kaufman*, 1 Cal. 3d 20, 35 n.16, 459 P. 2d 912, 81 Cal. Rptr. 360 (1969) for the latter proposition regarding invasion of privacy.

The Court then discussed without citation the importance of the "of and concerning" requirement in injurious falsehood cases, reasoning that the requirement "serves to immunize a kind of statement which, though it can cause hurt to an individual, is deemed too important to the vigor and openness of public discourse in a free society to be discouraged." (App. 88).

The Court then applied the "of and concerning" requirement to Mr. Blatty's complaint and stated, again in reliance on California decisions:

> In order to satisfy this requirement, the Plaintiff must effectively plead that the statement at issue either expressly mentions him or refers to him by reasonable implication. (*Cf. Kelly v. Johnson Publishing Co.* (1958) 160 Cal. App. 2d 718, 721-726 [action for defamation and invasion of privacy]; *Saucer v. Giroux*, (1921) 54 Cal. App. 732, 733-734 [action for defamation]).

(App. 93).

The Court noted that the List does not expressly refer to Mr. Blatty at all. (App. 93-94). Finally, once again in reliance on California law, the Court concluded that the list

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upon alleged injurious falsehoods," (55 U.S.L.W. 3649-50 (March 24, 1987)). But *Readers Digest Association* is not here before this Court. The holding below does not conflict with *Falwell*, as both the tort and the first amendment defense involved in this petition are different from those in *Falwell* — there emotional distress and actual malice, here interference with prospective economic advantage and "of and concerning." The disagreement with the *Falwell* decision thus is merely dicta. (*See* App. 98-100.)

"cannot be reasonably understood to refer to Blatty or his novel by implication," because the group of excluded authors is too large. (App. 94). The Court stated:

> 'But where the group is large—in general, any group numbering over 20-25 members—*the Courts in California* and other states have consistently held that plaintiffs cannot show that the statements were "of and concerning them," *see, e.g., Noral v. Hearst Publications, Inc.*, 40 Cal. App. 2d 348, 350, 104 P.2d 860 (1940); *Mullins v. Brando*, 13 Cal. App. 3d 409, 422-23 & n.13, 91 Cal. Rptr. 796 (1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2231, 29 L.Ed.2d 701 (1971) and cases cited therein; *Neiman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952).'

(App. 94-95) (emphasis supplied) (quoting *Barger v. Playboy Enterprises, Inc.*, 564 F. Supp. 1151, 1153 (N.D. Cal. 1983), (discussing Cal. defamation law)), *aff'd.*, 732 F.2d 163 (9th Cir.), *cert. den.*, 469 U.S. 853 (1984).

The Court then stated that the group of excluded authors here obviously numbers substantially more than twenty-five members, which Mr. Blatty does not dispute (App. 95), and it finally concluded that Mr. Blatty could not cure the defect by amendment. (*Id.*).

REASONS WHY THE PETITION SHOULD BE DENIED

I

THE DECISIONS OF ALL SEVEN JUSTICES OF THE CALIFORNIA SUPREME COURT INDICATE CLEARLY AND EXPRESSLY THAT THEY ARE BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

This Court lacks jurisdiction to decide this case because adequate and independent state grounds preclude the existence of a justiciable federal question. The Court clarified and refined its approach to the assessment of adequate and independent state grounds in *Michigan v. Long*, 463 U.S. 1032 (1983), noting that it would decline to review state court decisions that clearly articulate their state law basis. The Court held: "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." 463 U.S at 1041.

As the Statement of the Case reveals and a review of the opinion of the California Supreme Court will confirm, both the majority opinion below and the concurring and dissenting opinion based their affirmance of the dismissal of Mr. Blatty's claims upon state grounds. Concurring in the judgment of dismissal, Justice Grodin relied entirely upon Mr. Blatty's failure to allege intentional acts designed to disrupt Mr. Blatty's prospective economic relationship with his book buyers. This is one of the requisite elements for a tort claim for interference with prospective business

advantage. *Buckaloo v. Johnson*, 14 Cal. 3d 815, 827, 537 P. 2d 865, 122 Cal. Rptr. 745 (1975).

Mr. Blatty does not really take issue with the state law basis for the three justices' concurrence in the dismissal of his claim. He does strain, however, to eliminate the California constitutional underpinning of the majority's conclusion in support of dismissal. Anticipating this Court's recognition of its lack of jurisdiction because of the majority's reliance upon the California Constitution, Mr. Blatty characterizes the majority's definitional footnote as a "formalistic disclaimer."

There is nothing formalistic about the footnote. To the contrary, the footnote relates to the substance of the majority's opinion, as it defines for purposes of the entire opinion its use of the term "First Amendment" and explains that the term refers both to the federal and to the California Constitution. (App. 103 n.4). The majority then states that the opinion *primarily* relies upon the California Constitution, (*id.*), which, it elsewhere advises, "independently establishes a zone of protection that is broader still [than the First Amendment to the United States constitution]." (App. at 79) (citing *People v. Glaze*, 27 Cal. 3d 841, 844 n.2, 614 P. 2d 291, 166 Cal. Rptr. 859 (1980); *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 908-910, 592 P. 2d 341, 153 Cal. Rptr. 854 (1979), *aff'd.* 447 U.S. 74 (1980); *Wilson v. Superior Court*, 13 Cal. 3d 652, 658, 532 P. 2d 116, 119 Cal. Rptr. 468 (1975)).

Mr. Blatty suggests that the existence of adequate and independent state grounds should not be ascertained "by what [the state court] *says* it did." Petition at 41 (emphasis in original). That suggestion ignores the holding of this Court in *Long*, quoted above, which precludes review whenever the state court "clearly and expressly" states its reliance on separate, adequate and independent grounds. *Long*, 463 U.S. at 1041.

Here, the California Supreme Court expressly stated its reliance upon the more inclusive free speech protections of the California Constitution; it explicitly referred to the broader nature of those protections; and it cited ten different California decisions as authority for its primary constitutional holding.[6] A more "plain statement" (*Long*, 463 U.S. at 1042) that a decision rests upon separate state grounds cannot be imagined, short of a recitation that a state court was ignoring federal constitutional requirements altogether.

The *Long* test permits review only "when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law." *Long*, 463 U.S. at 1042.[7] The decision below is

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[6] The concurring and dissenting justices also recognized that the majority was relying separately upon the federal and state constitutions. Justice Grodin's opinion stated:

> If a plaintiff can prove that a media defendant knowingly published a false statement for the purpose of inflicting financial injury on him personally, I do not believe that the free speech provisions of *either the state or federal Constitution* would be offended if the defendant were held liable . . . .

(App. 107) (emphasis supplied).

[7] Those standards have been satisfied in each of the cases since *Long*—all quite unlike this one—in which this court has upheld its own jurisdiction. *See, e.g., Maryland v. Garrison*, 107 S. Ct. 1013, 1016-17 (1987) (Maryland opinion relies on the fourth amendment to the federal constitution in federal cases as well as the Maryland Declaration of Rights, but "the opinion indicates that the Maryland constitutional provision is construed in *pari materia* with the Fourth Amendment."); *New York v. P.J. Video, Inc.*, 106 S. Ct. 1610, 1613-14 n.4 (1986) (New York Court of Appeals cited New York Constitution "only once, near the beginning of its opinion, and in the same parenthetical also cited the Fourth Amendment to the United States Constitution"; and "the only citations appended to the crucial language quoted in the text were to . . .

quite unlike the decisions that fall within that description, such as the decision of the Ohio Supreme Court at issue in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), upon which petitioner relies heavily. In *Zacchini*, the Ohio Supreme Court syllabus and opinion did not mention the Ohio Constitution at all. The rationale for the state court decision appeared to have a purely federal basis. *Id.* at 568. The same is true of the rest of this Court's decisions in cases post-dating *Long* where no adequate and independent state ground was found. *See* cases cited in footnote 7, *supra.*

Because of the separate and independent state grounds for the decision below, review by this Court would lead to nothing more than an advisory opinion. This Court has noted the impermissibility of such an exercise:

> [O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would

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federal decisions"); *New York v. Class*, 106 S. Ct. 960, 963-64 (1986) (New York Court of Appeals mentions New York State Constitution "but once, and then only in direct conjunction with the United States Constitution"; and opinion generally cites both federal and New York cases for the same proposition); *Michigan v. Long*, 463 U.S. at 1043 ("Apart from its two citations to the State Constitution, the court below relied *exclusively* on its understanding of *Terry* [*v. Ohio*, 392 U.S. 1 (1968)] and other federal cases. Not a single state case was cited to support the state court's holding . . . .") (emphasis in original); *see also Montana v. Hall*, 107 S. Ct. 1825, 1827 (1987); *International Longshoremen's Association v. Davis*, 106 S. Ct. 1904, 1910-11 (1986); *Delaware v. Van Arsdall*, 106 S. Ct. 1431, 1435 n.3 (1986); *Caldwell v. Mississippi*, 105 S. Ct. 2633, 2639 (1985); *California v. Carney*, 105 S. Ct. 2066, 2068 n.1 (1985); *Ohio v. Johnson*, 467 U.S. 493, 497 n.7, *reh. den.*, 468 U.S. 1224 (1984); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 151-152 (1984); *Oliver v. United States*, 466 U.S. 170, 175 n.5 (1984); *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 361-362 (1984).

> be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945), *quoted in Zacchini*, 433 U.S. at 566; *see City of Long Beach v. Bozek*, 33 Cal. 3d 727, 728, 661 P. 2d 1072, 190 Cal. Rptr. 918 (1983); (holding on remand from this Court for clarification, that decision was based on the California Constitution); *see also Environmental Planning & Information Council v. Superior Court*, 36 Cal. 3d 188, 680 P. 2d 1086, 203 Cal. Rptr. 127 (1984) (reserving a right to decide whether the California Constitution may not permit distinctions between political and economic boycotts, even though this Court did permit the distinctions in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)).

II

THE CALIFORNIA CONSTITUTION'S FREE SPEECH PROVISION IS MORE DEFINITIVE AND INCLUSIVE THAN THE FIRST AMENDMENT.

California free speech decisions consistently have recognized that the California Constitution, and the California Supreme Court and appellate decisions construing it, afford greater protection to free expression than does the United States Constitution. *See San Jose Mercury-News v. Municipal Court*, 30 Cal. 3d 498, 508, 638 P. 2d 655, 179 Cal. Rptr. 772 (1982) ("We have recognized that in both language and scope" California's "liberty-of-speech-and-press clause" is "broader than the First Amendment."); *Wilson v. Superior Court*, 13 Cal. 3d at 658 (California free speech clause is more "definitive and inclusive" than first amendment).

Although the free speech clause of the California Constitution is similar to the first amendment, the two are not the same. *Gonzales v. Superior Court*, 180 Cal. App. 3d 1116, 1122, 226 Cal. Rptr. 164 (1986). A comparison of the two provisions shows that the California Constitution has supplemented the first amendment's proscription of laws abridging free speech with an affirmative right of "every person" to "freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right." Cal. Const. art. I, § 2. This provision, and the correlative right to petition for redress of grievances and to assemble "are construed as more protective, definitive and inclusive of rights to expression of speech than their federal counterparts." *Gonzales*, 180 Cal. App. 3d at 1123.

This Court already has acknowledged the separateness, adequacy and independence of the California Constitution's free speech provision. *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), and *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d at 908-10.

Robins required the courts to apply this Court's earlier decision in *Lloyd v. Tanner*, 407 U.S. 551 (1972), in which this Court held that the first amendment did not prevent a shopping center owner from prohibiting distribution of leaflets when they communicated no information relating to the center's business and when there was an adequate, alternate means of communication. The California Supreme Court in *Robins* concluded that *Lloyd* "does not prevent California's providing greater protection than the First Amendment now seems to provide" *Robins*, 23 Cal. 3d at 910, and that the California Constitution protects speech and petitioning, reasonably exercised, in privately owned shopping centers. *Id.*

In reaching that conclusion, the California Supreme Court noted:

> Though the framers [of the California constitution] could have adopted the words of the federal Bill of Rights they chose not to do so. (*See* Note, *Rediscovering the California Declaration of Rights* (1974) 26 Hastings L.J. 481.) Special protections thus accorded speech are marked in this court's opinions.

23 Cal. 3d at 908.

When the shopping center owner appealed from the California Supreme Court's decision, this Court held that its conclusion in *Lloyd* did not limit a state's "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Lloyd v. Tanner*, 447 U.S. at 81.

Against the backdrop of this Court's recognition of the California Constitution's greater solicitousness for the protection of free speech, the California Supreme Court in the decision below undertook its free speech analysis with frequent reference to "First Amendment" principles, as defined to include the broader California free speech clause.[8]

Mr. Blatty argues that this court may review the California Supreme Court's decision because its reference to

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[8] The California Supreme Court used a similar approach previously. In *People v. Glaze*, 27 Cal. 3d 841, 844 n.2, 614 P. 2d 291, 166 Cal. Rptr. 859 (1980), the court rested its entire decision on article I, section 2 of the California Constitution and noted:

> This section is more protective of speech than the First Amendment of the United States Constitution. [citation omitted.] This court therefore only addresses the question whether the challenged [municipal code section] is consistent with the California Constitution. Nevertheless, in keeping with convention, the free speech rights at stake will be referred to as First Amendment rights.

27 Cal. 3d at 844 n.2.

federal constitutional decisions shows a reliance on federal law. As the *Robins* cases before the California Supreme Court and this court illustrate, mere reference to federal constitutional decisions does not establish the federal constitution as the governing standard. "Federal law can provide guidance, even though it is not controlling in this area. California principles will prevail, though, as long as federal rights are protected." *Gonzales*, 180 Cal. App. 3d at 1123.[9]

The California Constitution's broader protection for free speech thus dictated the result below. That protection would continue regardless of this Court's decision on the first amendment issue that the petition presents. There is therefore no basis for a review by this Court.

CONCLUSION

Because the California Supreme Court, in both of its opinions unanimously affirming the dismissal of petitioner's claims, "clearly and expressly" stated that its decision was based on state law grounds adequate to sustain the decision and independent of the federal constitutional basis for the majority holding, this Court lacks jurisdiction to grant the petition. Both the California tort principles upon which the concurring justices relied and the California constitutional

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[9] *See Alim v. Superior Court*, 185 Cal. App. 3d 144, 229 Cal. Rptr. 599 (1986) ("[W]e do not use the federal precedents as federal law. Rather, we use them by analogy to inform us of the content of our own constitutional protections of a free press, . . . which are 'more definitive and inclusive than the First Amendment. . . .' [Citation omitted]. In this matter we found our decision wholly upon the California Constitution and resolve questions about the application of federal precedents as questions of state law"); *accord, U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory*, 154 Cal. App. 3d 1157, 1163, 201 Cal. Rptr. 837 (1984).

principles that underlay the majority's holding are independent of federal considerations.

The petition for a writ of certiorari should be denied.

DATED: June 3, 1987

Respectfully submitted,

GIBSON, DUNN & CRUTCHER
RICHARD P. LEVY
Counsel of Record
GAIL E. LEES
WILLIAM C. FOUTZ

THE NEW YORK TIMES COMPANY
DAVID A. THURM
Of Counsel

Attorneys for Respondent
THE NEW YORK TIMES COMPANY